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In the
Supreme Court of the United States

OCTOBER TERM 1963

No. 255

BROS INCORPORATED

Petitioner

vs.

BROWNING MANUFACTURING COMPANY AND SHOVEL SUPPLY CO., INC.

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is reported at — F.2d —, and is reprinted in the Appendix hereto annexed (A-1).

The decision, by the United States District Court for the District of Minnesota, of February 21, 1962, as amended on May 9, 1962, with the Final Judgment of June 12,

1962, is reported only in 134 USPQ 231, but copies thereof are reprinted at pages 21, 49, 52, respectively, of the printed Record (R.) in the Court of Appeals.

The Minnesota District Court's Findings of Fact and Conclusions of Law, dated March 20, 1962, are reprinted at R. 35-44, and a Court Order of May 9, 1962, substituting a new Finding No. 21 and adding a new Finding No. 23, is reprinted at R. 49-52.

An Order, dated August 16, 1960, denying a plaintiff's Motion for Summary Judgment, and including an Opinion by the Minnesota District Court, is reported only at 126 USPQ 499, but is reprinted at R. 8-21.

The Bros patent No. 2,610,557 (R. 165-173), here in suit, was the subject of an earlier action filed June 24, 1954 in the United States District Court for the Northern District of Ohio, Eastern Division, entitled Wm. Bros Boiler and Manufacturing Company (By change of name now Bros Incorporated) v. Gibson-Stewart Company, Inc. The District Court's decision holding the patent valid and unfringed is reported only at 116 USPQ 138. The judgment was affirmed by the Sixth Circuit Court of Appeals, in *Gibson-Stewart v. Wm. Bros, etc.*, at 264 F.2d 776 reprinted in the Appendix hereto (A-9) and a petition for writ of certiorari was denied by the Supreme Court at 360 U.S. 929, 79 S.Ct. 1448.

Another suit for infringement of the Bros patent No. 2,610,557, was filed December 26, 1957 in the United States District Court for the Northern District of Texas, Dallas Division, Bros Incorporated v. W. E. Grace Manufacturing Company and William E. Grace. Summary judgment in favor of plaintiff was entered by the District Court, Bros Inc. v. W. E. Grace et al., 158 F.Supp. 786, the court holding that the Graces, having defended the Ohio

suit, were bound by the judgment therein under the doctrine of *res judicata*. That judgment was affirmed by the Court of Appeals for the Fifth Circuit, in Bros Incorporated v. W. E. Grace Mfg. Co. et al., 261 F.2d 428.

In the Ohio suit, and following the denial of certiorari by the Supreme Court, the appellant Gibson-Stewart Company, Inc. successively filed with the Sixth Circuit Court of Appeals (a) motions to stay and modify its mandate, (b) a petition to recall and modify the mandate, and (c) a request for reconsideration denying such petition. Such motions, petition and request all sought relief from the original judgment for the reason, *inter alia*, that the Bros patent should be declared invalid because the invention thereof was allegedly disclosed in the Bros pamphlet entitled "50 TON COMPACTOR WITH OSCILLATING WHEELS" being the same identical pamphlet which appears herein (R. 163-164) as Defendants Exhibit D-4, and which was held by the Minnesota District Court to have been published in July 1948 so as to constitute a statutory bar to the validity of the patent under Section 102(b), Title 35 U.S.C.

The (a) motions, (b) petition, and (c) request referred to in the foregoing paragraph were all denied by the Sixth Circuit Court of Appeals' Orders of July 30, 1959, October 1, 1959 and November 13, 1959, reprinted at R. 199-202.

In the aforesaid Dallas suit the Grace defendants, on or about December 9, 1959, filed in the U. S. District Court a Petition For Leave To Reopen, contending, *inter alia*, that the Bros patent in suit should be declared invalid by reason of the alleged disclosure of the invention in the same identical Bros pamphlet here in evidence as Defendant's Exhibit D-4 (R. 163-164) more than one year prior to the filing date of the application for the patent in suit so as to alleged-

ly constitute a bar to its validity under Section 102(b), Title 35 U.S.C.

The Order of the Dallas case District Court, of February 2, 1960, denying the Graces' Petition For Leave To Reopen, is reprinted at A-16.

In the aforesaid Dallas suit, the Graces, on March 9, 1962, filed with the U. S. District Court a Motion by Defendants under Rule 59 FRCP again seeking a new trial and again asserting invalidity of the Bros patent by reason of the publication of the Bros pamphlet (Def. Exh. 4, R. 163-164), allegedly "contrary to the conditions prescribed by 35 U.S.C. 102(b)," and in this instance supporting the Motion by supplying the Court with a copy of the Minnesota District Court's decision of February 21, 1962 (R. 21-34) holding the patent invalid under 35 U.S.C. 102(b).

The opinion of the Dallas District Court, of April 6, 1962, and Order of April 17, 1962 denying the Graces' Motion under Rule 59 is reprinted at A-17.

The Graces, as of April 23, 1962, filed a Defendants' Notice of Appeal to the United States Court of Appeals for the Fifth Circuit from the District Court's Order of April 17, 1962 denying the Motion under Rule 59 for new trial, and since that appeal is currently under consideration by the Fifth Circuit Court its decision thereon is not yet available.

Another, or fourth suit involving the Bros patent No. 2,610,557 was filed July 25, 1960 in the United States District Court for the Western District of Texas, San Antonio Division, being Civil Action No. 2860, *'Bros Incorporated v. Tampo Manufacturing Company*. That case has not been tried, and as yet there are no decisions to report.

GROUNDS FOR INVOKING THE JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Eighth Circuit was dated and entered as of May 27, 1963. No petition for rehearing was filed, and no order for an extension of time within which to petition for certiorari has been requested. A motion to stay mandate, pending this application for certiorari, was granted by the Court of Appeals pursuant to Rule 16 of that Court.

Jurisdiction of this Court is believed to be conferred on it, for purpose of reviewing the judgment in question, by virtue of the provision of the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C.A. 1254(1), and Sec. 2101(c).

The jurisdiction of this Court is invoked on the grounds: (1) that the Bros et al. patent No. 2,610,557, as to all of its claims, has been held valid by the Sixth Circuit Court of Appeals and has been held invalid by the Eighth Circuit Court of Appeals, thus creating a serious conflict between judgments that should be resolved by this Court, (2) that the Eighth Circuit Court of Appeals has interpreted Sections 102 and 103 of Title 35 U.S.C.A. (the 1952 Patent Act) in a manner inconsistent with the language of the Act itself, and in direct conflict with the conclusions reached by the Sixth Circuit Court of Appeals; thus giving rise to an important question that should be answered by this Court, (3) that the Eighth Circuit Court of Appeals has construed the four claims of the Bros patent in suit in a manner which conflicts with the interpretation given them in the Sixth Circuit decision and is also inconsistent with the clear meaning and scope of the claims as determined by the record of proceedings thereon in the Patent Office, thus giving rise to confusion that is of critical importance particularly to the industry and to other courts that may yet be called on to adjudicate the claims.

QUESTIONS PRESENTED

1. When construing a patent claim, for purpose of determining the substance and scope of an invention, may limitations in the claim, that were expressly included to distinguish it from other claims that were rejected and withdrawn in the Patent Office, be disregarded?

2. When the language of a statute is so clear as to leave no doubt as to its meaning, may it be modified or qualified by reference to its legislative history?

3. Are the conditions for patentability of an invention, as set forth in Section 102 of Title 35 U.S. Code (the 1952 Patent Act) qualified by the words "identically disclosed or described as set forth in section 102 of this title" which appear in Section 103 of the same Act?

4. If a patent claim satisfies all the conditions for patentability set forth in sub-sections (a) and (c) through (g) of Section 102, and also Section 103 of Title 35 U. S. Code, may it be held invalid under Section 102(b) on a publication if the invention defined by the claim is "not identically disclosed or described" in such publication, as required by Section 103?

5. If the pilot model of the Bros roller, as exhibited at the 1948 Road Show, embodied the elements set forth in the claims of Bros et al. patent No. 3,610,557, but was not, more than one year prior to the date of the application for the patent, sold or offered for sale, was not used for the purpose for which it was made, was not loaded or operated either publicly or commercially, or privately or experimentally, and was not reduced to practice, either actually or constructively, until within the one year period before filing, do the photographs, drawings and description of said

roller, as found in the Bros pamphlet (D.X. 4), even if they be held to disclose the entire claimed structure, constitute a bar to the validity of the patent under § 102(b) Title 35 U.S. Code?

6. Did the District Court's substitute Finding No. 21 (R. 50) justify the Conclusion 2 (R. 43) that as a matter of law each of the four claims of the Bros patent in suit "is invalid under the provisions of 35 U. S. Code § 102(b)?

STATUTES INVOLVED

The questions presented herein, while embraced within the constitutional provisions for the issuance of patents (Art. 1, Sec. 8, cl. 8), and the patent laws of the United States enacted pursuant thereto, are particularly concerned with three sections (101, 102 and 103) of the relatively recent 1952 Patent Act (66 Stat. 792, Title 35 U.S.C.A.), which sections replaced the single Section 31 of the previous Act, R.S. §4886, all of which sections are reprinted at A-19-A-21.

STATEMENT OF THE CASE

This is a declaratory judgment action which was brought by plaintiffs Browning Manufacturing Co. and Shovel Supply Co., Inc. against Bros Incorporated for the purpose of adjudicating the issues of validity and infringement as to all four claims of the Bros et al. patent No. 2,610,557. The U. S. District Court for the District of Minnesota had jurisdiction by reason of the provisions of 28 U.S.C. §1338, § 2201, §2202, and §1332. Defendant, Bros, filed Answer, including Counterclaim asserting infringement by plaintiffs, to which plaintiffs replied, and issue was joined.

Plaintiffs' motion for summary judgment was denied

by the District Court (R. 8-21), the case was tried to the Court, which, speaking through the Honorable Judge Gunnar H. Nordbye (R. 21-34, and 49-52), concluded the patent to be "invalid under the provisions of 35 U.S. Code §102(b)," (R. 43) and accordingly gave judgment to plaintiffs while dismissing defendant's counterclaim. The issue of infringement was not decided and is not here involved. On appeal the judgment was affirmed by the Court of Appeals for the Eighth Circuit (A-1) and this Petition followed.

Unlike most patent cases this one does not bring up for review the customary defenses of anticipation, lack of invention, want of novelty, obviousness, prior knowledge, prior use and sale, etc. These and many other issues were vigorously litigated but were resolved here by the District Court, as they were in the Sixth Circuit courts, in favor of the patent. In short, the device of the Bros patent has fulfilled a high standard of invention, in both circuits, and since plaintiffs did not appeal the question of invention that issue is closed.

The Pneumatic Roller Compactor of the patent, as shown in sheets 1 and 2 of the drawings thereof (R. 165-166), comprises a generally rectangular hollow body having a transversely extending arched recess in which are disposed two pair of pneumatic tired supporting wheels. A draft beam for attachment to a tractor extends back through the arched recess, to form a tie bar between the lower ends of the recess walls. The supporting wheels are secured to a pair of fore-and-aft rocker beams, which also serve as reinforcing spacers between the recess walls at points spaced laterally from the draft beam.

The four claims of the patent are reproduced, verbatim but in analytical form, at A-21-A-25, and appear, in con-

densed form. (A-10-A-11) in the decision by the Sixth Circuit Court of Appeals.

In July 1948, one year and four months prior to the filing date of the application for the patent in suit, petitioner Bros publicly displayed a so-called pilot model of the compactor at a Road Show in Chicago. The machine was not for sale nor even offered for sale. It had not been used, operated or even tested. In fact, and as noted in the District Court's Finding 14 (R. 39):

> "It never was loaded and operated, either publicly or commercially, or for that matter, either privately or experimentally. Experimental testing on the roller does not appear to have been conducted until some months had passed subsequent to the Road Show."

That Finding was not challenged, by either party. The experimental testing referred to did not occur until December 1948, or within the one year statutory time limit for filing of the application.

Turning to the Bros pamphlet (Def. Exh. D-4, R. 163-164) the District Court, in its Findings 19, 20 and 21 (R. 40-42 and 50-51) and Conclusion of Law 2 (R. 43), as affirmed by the Eighth Circuit Court of Appeals, holds that it was a printed publication more than one year prior to the Bros filing date and that the invention of the patent was described in the pamphlet, so that "said patent, with respect to each of the four claims therein, is invalid under the provisions of 35 U.S. Code § 102(b)."

In the Eighth Circuit Court of Appeals defendant did not challenge the finding that the pamphlet was distributed at the Road Show in July 1948, but did challenge the courts' conclusion that it describes the invention of the patent within the purview of 35 U.S. Code § 102(b).

In the Sixth Circuit Court of Appeals three attempts were made by the defendant (infringer) in that case to modify mandate for the purpose of permitting that defendant to establish the same identical Bros pamphlet (R. 163-164) as a bar to the validity of the Bros et al. patent 2,610,557 under 35 U.S.C. § 102(b), but in each instance the plea was rejected, on the last occasion the Court specifically finding it "to be without merit."

In the Dallas case, now pending before the Fifth Circuit Court of Appeals, the District Court, by its Order of April 6, 1962 (A-17), denied the defendants' motion under Rule 59 FRCP for a new trial, which, too, was based on the same identical ground, namely, that the Bros patent should be held invalid by reason of the pamphlet (Def. Ex. D-4) allegedly constituting a bar to its validity under 35 U.S.C. § 102(b). In this instance the Dallas court not only denied the motion, but did so notwithstanding the fact that the motion was accompanied by a copy of the Minnesota District Court's decision of February 21, 1962 (R. 21) holding the patent invalid under 35 U.S.C. § 102(b).

It will thus be seen that diametrically opposed conclusions have been reached by widely separated Federal courts in three judicial circuits on the same issues of patent statute and patent claim interpretations. These issues are not only of importance to the various litigants in the extensive Bros litigations, and to the industry, but are also of substantial public importance because they arise out of relatively new provisions of the 1952 Patent Act. Under these circumstances, and since this Court has not previously passed on these issues, the granting of certiorari will, it is believed, result in resolving the conflict and clarifying the confusion that now exists.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

Several issues arise in connection with the particular Questions Presented in this Petition.

The first of these relates to the definition of the invention as found in the four claims of the patent, and the limitations imposed thereon by the Patent Office before allowing the claims. These are primary and critical factors, and perhaps there is no rule in patent law that has been more firmly established by this Court than this—that a claim in a patent defines the invention thereof (*White v. Dunbar*, 119 U.S. 530, 7 S.Ct. 376, 1886), and, if there is any doubt as to its scope or meaning the claim must be read and interpreted with respect to other claims that were rejected and cancelled or amended (*Hubbell v. United States*, 179 U.S. 77, 21 S.Ct. 24, 45 L.Ed. 95).

In the present case neither the District Court nor the Court of Appeals comments on the distinctions between the claims, nor between the claims of the patent and those that were not allowed, and certainly neither decision indicates a clear understanding as to the precise nature and scope of the invention defined by the claims as they appear in the patent.

On the other hand, the Court of Appeals for the Sixth Circuit clearly demonstrated that it had a very complete and clear understanding of precisely what the claimed invention is, even to the point of emphasizing the more critical limitations in the claim abstracts or condensation that appear in its decision of February 19, 1959 (A-10-A-11). For such reason it seems self-evident that when that Court rejected the Bros pamphlet as a bar to validity, it was because it recognized precisely what the invention actually

was and realized that the claimed structure is not disclosed in the pamphlet.

For present purposes it is thought unnecessary to discuss the Bros claims at length. As examples, however, of claim limitations that are significant it will be found that the Sixth Circuit correctly paraphrases claim 1 in part by including:

> "a draft beam extending longitudinally through the lower part of the body, centrally thereof, such draft beam traversing the arch recess between two of such wheels and rigidly connecting opposite wall portions of the recess."

By this limitation claim 1 (which was claim 2 of the application (R. 175)) is clearly distinguishable from claims 3 and 4 of the application (R. 176) that were rejected (R. 179) and subsequently withdrawn (R. 181).

Claim 2 of the patent, which was claim 13 of the application, was rejected by the examiner (R. 190), and was not allowed until it was amended, as shown (R. 180), to include:

> "bearings (26) for the fore-and-aft supports (25) disposed at the lower ends of the arched recess, (with) said supports (25) maintaining the lower ends of the recess wall in parallelism."

Here again, the Sixth Circuit Court of Appeals clearly recognized the existence and importance of this feature in its summarization (A-10-A-11).

There is not the slightest indication that either the Minnesota District Court or the Court of Appeals for the Eighth Circuit recognized the above quoted features in claims 1 and 2 (and other features in claims 3 and 4) as distinguishing those claims from claims that were rejected and cancelled, or withdrawn.

It thus appears that the Eighth Circuit courts were led into conclusions that were not only erroneous but were also in conflict with the claim interpretations arrived at by the Sixth Circuit courts, and such conflict should now be resolved by this Court granting certiorari and answering the first of the Questions Presented in the negative.

The Eighth Circuit Court of Appeals misconstrued Sections 102 and 103, of Title 35 U.S. Code, in failing to recognize how they are distinguishable from the repealed Section 31 of Title 35 U.S. Code (R.S. § 4886), for which they were substituted in 1952, and in not qualifying § 102(b) with limitations clearly imposed thereon by § 103. These are extremely important considerations to the public, as well as to the courts in administrating the patent law, and should therefore be resolved by this Court.

In its position that the 1952 Act made no material changes in the previous act, and that Section 103 does not qualify Section 102, the appellate court relies on revisor's notes (A-7) found in the legislative history of the new Act, and in its own 1923 decision, *Lynch v. Alworth-Stevens Co.*, 294 F. 190, suggesting the possibility of a narrow, hidden meaning.

In doing so, however, the Court of Appeals overlooks or disregards its own 1952 decision in *Warner v. Dworsky*, 194 F.2d 277, wherein it quotes (p. 279) from this Court's decision in *Mackenzie v. Hare*, 239 U.S. 299, 36 S.Ct. 106, clearly holding, as this Court has often held, that debates and reports on the enactment of a bill must give way to the language of the act itself.

The Eighth Circuit decision further demonstrates confusion in statute interpretation as applied to the present situation by its legislative history note (A-7) on Section 103 in which it is correctly stated that:

> "There is no provision corresponding to the first sentence explicitly stated in the present statute (§ 31), but the refusal of patents by the Patent Office, and the holding of patent invalid by the courts on the ground of lack of invention or lack of patentable novelty has been followed since at least as early as 1850."

The Appeal Court's reliance on this quotation is particularly ironical because, as pointed out above, the issues in this case no longer include "lack of invention or lack of novelty." They were decided and in favor of the patent by the Sixth Circuit courts, and also by the Minnesota District Court's decision of February 21, 1962.

Further confusion is generated on this issue by the fact that both Eighth Circuit courts have completely failed to recognize the distinctions, that are so important to this case, and which are inherent in the 1952 Act, between the defense of anticipation in the prior art, to which Section 102(a) is directed; that of prior invention by someone else, to which Section 102(g) is directed; that of obviousness or lack of invention, to which Section 103 is directed; and the one year statutory bar to patentability created by Section 102(b) here relied on by respondents.

Here then are four specifically different defenses, establishable by different types of evidence. Yet, and even though they are statutory distinctions, they were ignored by the trial court and were noted and rejected by the Court of Appeals.

The authorities relied on by the District Court (R. 29) are *Trico Products Corp. v. Delman*, 180 F.2d 529, and *Application of Pappas*, 214 F.2d 172. The *Trico* decision was written two years before the 1952 Act became law and the claims were held "void for want of invention" involving "neither invention nor mechanical skill." The *Pap-*

pas decision affirmed the rejection of claims as being "anticipated." Neither decision is relevant to the present issue of patentability under § 102(b).

The Court of Appeals also cites two decisions (A-6) *Collins v. Owens*, 310 F.2d 884, and *Midland Flour Milling Co. v. Bobbitt*, both of which are equally foreign to the present issue. Thus, the *Midland* case, of 1934, a prior art publication was held to be an "anticipation" and the patent was held "void for want of invention," while in the *Collins* case a patent was also held invalid "for lack of invention" and for "anticipation," neither of which is a defense under Section 102(b).

As between the issues in the *Collins* case and those here presented the Court of Appeals stated (A-6), that "We perceive no controlling distinction," thus further emphasizing the need for judicial recognition of the distinction and proper solution to an important problem by this Court.

Another issue of substantial importance, and on which there is also a paucity of court decisions, is that noted in the fifth of the Questions Presented, which assumes but by no means admits, that the precise combinations of elements set forth in the respective claims of the Bros et al. patent are disclosed in the Bros pamphlet (Def. Ex. 4, R. 163-4).

This issue, on which the Eighth Circuit courts also elected to remain silent, is predicated on the premise that if the pilot model of the Bros machine was not sold nor offered for sale, and was not loaded, operated, or tested, publicly, commercially, privately or even experimentally, more than one year before the Bros filing date, as the trial court found to be the case (F. 39), there could have been no reduction to practice of the invention, either actually or constructively, prior to November 17, 1948, and consequently the disclosure of such an uncompleted invention in

the Bros pamphlet, if prior to that date, is insufficient to constitute a bar to validity under § 102(b).

The process of inventing includes the familiar steps of conception, drawings, describing, making, experimenting, testing, etc., but it is axiomatic in patent law that an invention does not come into existence as such until it is reduced to practice, either actually, by building and successfully operating a machine embodying the invention, or constructively, by the filing of a formal patent application.

This Court long ago established the rule that tests and experiments are not disclosures of an invention, *Elizabeth v. Pavement Co.*, 97 U.S. 126, 24 L.Ed. 1000. That being the law, and with the Bros machine not even having reached the experimental stage, more than one year prior to the filing date, it is difficult to understand how the portrayal of that machine in the pamphlet can be more effective under § 102(b) than the machine itself. Yet that is precisely what the trial court and the Eighth Circuit Court of Appeals have in effect held.

Thus Question 5 brings before this Court an important issue which the courts below have not answered and which this Court should resolve.

In rejecting the argument that the words "identically disclosed or described," as found in § 103 qualifies § 102(b) the Eighth Circuit decision (A-7) also rejects or ignores the time honored cardinal rule of this Court that when interpreting related provisions of a statute every word thereof shall, if possible be accorded effect and significance. *Ex parte Public National Bank of New York*, 278 U.S. 101, 49 S.Ct. 43, and *Washington Market Co. v. Hoffman*, 101 U.S. 112, 25 L.Ed. 782.

Both decisions below also fail to recognize the all important distinction between the two sections in that § 102

(b) presupposes the existence of novelty and invention, but denies the patentee the right to a valid patent if he has not timely filed his application, while § 103 denies him a patent if his device does not qualify as an invention. Thus § 103, recognizing want of invention or obviousness "to a person having ordinary skill in the art," opens up the entire area of conjecture, impressions and opinions which bear on that issue, while that is made an exception to § 102(b) where those privileges are not granted.

Unfortunately neither this Court, nor any other court as far as we know, has thus far rendered a decision specifically construing § 102(b) in the light of the requirement that the claimed invention must be "identically disclosed" (per § 103) in the publication for the latter to constitute a bar to patentability, except, of course, for the present Eighth Circuit decision, and if it rejects the plain terms of the statute itself, as seems apparent, certainly the situation is one to which this Court sould be desirous of exercising its jurisdictional authority by granting this petition and deciding the issues raised by the presented Questions 2, 3 and 4.

The f al Question (6) presented to this Court raises an issue that is summarily disposed of by the Court of Appeals as one of fact, but is one that cannot possibly be properly resolved without first recognizing critical limitations in the claim language, statutory prerequisites, and some determination of how far a court may go, if at all, in calling in the mythical person skilled in the art to supply deficiencies in a publication to make it available as a defense under § 102(b), all questions of law.

The evidence in this case, and particularly that produced on cross-examination of respondents' own witnesses (R. 68-70, 75-78, 84, 108-110, 114-118, 122-123 and 142-

143), conclusively demonstrates that if weight be given to critical limitations of the Bros et al. patent claims, such as those quoted on page 12 hereof, as the law requires, then it is simply impossible to find a disclosure of "the invention" in the Bros pamphlet.

But it should here be unnecessary to argue that point because there is no possible way that testimony can alter or enlarge on the disclosure of the circular, which so obviously falls far short of showing the full and exact invention defined by the claims.

The District Court apparently recognized that the Bros "invention" was not "described" in the pamphlet, as required by § 102(b), but then cures this defect by deciding that the missing elements (even though considered critical by the Patent Office) could be supplied by "ordinary mechanical skill" (R. 30), and that "one skilled in the art generally would have no great difficulty in producing a similar device, despite the fact that exact drawings and specifications are lacking" (R. 29).

Having agreed with the Sixth Circuit decisions on the issues of invention and novelty over the prior art the District Judge erred; we submit, in drawing on the prior art and on those skilled in the art, these being liberties that may be resorted to only under the specific language of § 103 but may not be done under the more restrictive provisions of § 102(b). Clarification of this issue by the Supreme Court is very important as it would dispel much of the confusion that now exists in construing the 1952 Patent Act.

CONCLUSION

In view of the foregoing a Writ of Certiorari should issue out of this Court directed to the United States Court of

Appeals for the Eighth Circuit so that the decision of said Court of Appeals as filed May 27, 1963 may be reviewed by this Court and appropriate correction of errors therein be made.

Respectfully submitted,

ANDREW E. CARLSEN
Attorney for Petitioner.

CERTIFICATE OF SERVICE

Three copies of the foregoing Petition for Writ of Certiorari have been served on the respondents by mailing said copies first class air mail, postage prepaid, to respondents' attorneys, Messrs. Parrott & Rankin, Wachovia Bank Building, Charlotte 2, North Carolina, this 3rd day of July 1963.

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